

No. 92-1911

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,
Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Washington

BRIEF OF AMICUS CURIAE
NORTHWEST HYDROELECTRIC ASSOCIATION
IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae, Northwest Hydroelectric Association (NWhA), is the trade association of the Pacific Northwest hydroelectric industry.¹ Its members include publicly-owned and investor-owned utilities, municipalities, a Native American tribe and independent power producers

¹ Both Petitioners and Respondents have consented to NWhA filing a brief amicus curiae. Letters from counsel for Petitioners and Respondents reflecting their consent have been filed with the Court.

located in Idaho, Montana, Northern California, Oregon and Washington.²

NWHA adopts in their entirety the briefs of Petitioners and amici curiae in support of Petitioners. It writes separately to provide the Court with examples of other states that have imposed non-water quality conditions under the guise of § 401 of the Clean Water Act³ and to illustrate the severe impact those unauthorized conditions have on the licensing process.

SUMMARY OF ARGUMENT

Under the Federal Power Act, Congress vested the Federal Energy Regulatory Commission (FERC) with exclusive authority to license hydroelectric projects. Congress specifically required FERC to condition such licenses to protect and enhance fish and wildlife, which includes determining minimum streamflows. States usurp FERC's authority when they impose minimum streamflows under the guise of § 401. What the Washington Department of Ecology did on the Elkhorn project is nothing more than an end run around FERC's exclusive licensing authority.

The State of Washington is not alone in this unauthorized exercise of power. Oregon and Idaho also have erroneously imposed non-water quality conditions on hydroelectric projects as conditions of § 401 certification.

The states' actions burden an already complex and costly licensing process. Hydropower owners, operators and developers spend millions of dollars and several years conducting extensive studies to satisfy the multitude of concerns raised by the states. They engage a variety of experts, including lawyers, economists, accountants, engineers, biologists, environmental and recreational consult-

² A list of the membership of NWHA is included in the attached Appendix.

³ 33 U.S.C. §§ 1251-2623 (1988).

ants and others with no certainty that the state will ever grant certification. Imposing non-water quality conditions on the certification process only injects further uncertainty, increases the expense, adds to the bureaucracy, fosters piecemeal litigation and creates interminable delay. As illustrated in the Benham Falls example below, the process may deplete the developer's finances to the point where it is ultimately forced to abandon the project.

ARGUMENT

I. IMPOSING NON-WATER QUALITY CONDITIONS UNDER THE GUISE OF § 401 CERTIFICATION IS NOTHING MORE THAN AN END RUN AROUND FERC'S EXCLUSIVE AUTHORITY TO LICENSE HYDROELECTRIC PROJECTS.

FERC's authority in the area of licensing hydroelectric projects is exclusive. *California v. FERC*, 495 U.S. 490 (1990). Although states play an important and integral role in the licensing process, they do not *share* this authority with FERC. *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 167-68 (1946). Under § 10(j) of the Federal Power Act, 16 U.S.C. §§ 791-828 (1988) (FPA), fish and wildlife considerations, including minimum streamflows, fall within FERC's "broad and paramount federal regulatory role." *See California v. FERC*, 495 U.S. at 499.

When Congress amended the FPA in 1986,⁴ it specifically required FERC to include fish and wildlife conditions in hydroelectric licenses. Congress created a coordinated regulatory scheme in which state fish and wildlife agencies, along with various other federal agencies, make *recommendations* to FERC regarding the necessary conditions to protect fish habitat. *See* 16 U.S.C. § 803(j)(2). While Congress envisioned that FERC would accord the

⁴ Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243, 16 U.S.C. §§ 797(e), 803(a)(1).

agencies special deference, it nonetheless gave FERC the authority to reject the recommendations when they were inconsistent with the purposes and requirements of Part I of the FPA. *Id.*

In the instant case, the effect of the Washington Department of Ecology's action is to supplant FERC on the issue of the streamflows necessary to protect fish habitat. FERC does not look behind the state water quality agency's determination on § 401 certification.⁵ As are discussed in the briefs of other amici in support of Petitioners, the state's decision must be based on a promulgated water quality standard and not a general public interest criterion at the state's discretion.

II. OTHER STATES ALSO CIRCUMVENT FERC'S EXCLUSIVE AUTHORITY BY IMPOSING NON-WATER QUALITY CONDITIONS ON § 401 CERTIFICATION.

The Elkhorn project is not an isolated example. As illustrated by another amicus curiae, Pacific Northwest Utilities, the Washington Department of Ecology recently imposed minimum streamflow conditions on the water quality certificate for the White River Project. Other states in the Northwest similarly are imposing non-water quality conditions on § 401 certification. In doing so, these states accomplish indirectly what Congress prohibited them from doing directly under the FPA. Two examples

⁵ See *Town of Summerville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992) ("since pursuant to § 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of the state courts and not the Commission"); *Noah Corporation*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991) ("we recognize that review of the appropriateness of water quality certification conditions is a matter for state courts to decide"); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172 (1990) ("review of the appropriateness of water quality certification conditions is the purview of the state courts").

of proposed hydroelectric projects in Oregon and Idaho reflect the true situation.

A. Boulder, Empire and Kanaka Rapids Projects.

The developer, L.B. Industries, Inc. (LBI), seeks to construct three relatively small hydroelectric plants along a two to three mile stretch of the Snake River near Bliss, Idaho.

Between June and July, 1992, LBI filed original license applications with FERC for all three projects, which FERC accepted for filing. FERC Nos. 10772, 10849, 10930. In June, 1992, LBI requested § 401 certification from the Idaho Department of Environmental Quality (IDEQ).⁶ IDEQ denied certification one year later, citing as one reason insufficient bypass flows.⁷

LBI spent over \$1.2 million dollars conducting the studies requested by various agencies, including the Environmental Protection Agency, the United States Fish and Wildlife Service (USFWS), the United States Department of Fish and Game and the Army Corps of Engineers. LBI retained the services of preeminent environmental consultants, Dr. Charles Brockway and Mark Hill, to study bypass flows. Although LBI's studies concluded that flows of 900 cubic feet per second (cfs) were the minimum flows necessary to preserve fish habitat, it suggested 1,000 cfs as the minimum flow. USFWS wanted to increase the minimum streamflows to 1,400 cfs. In denying § 401 certification, IDEQ did not impose minimum streamflows.

⁶ For certification purposes, IDEQ and LBI have treated the three projects as one.

⁷ Minimum streamflows are not part of Idaho's Water Quality Standards. See Idaho Adm. Code 16.01.2200, 16.01.2250. IDEQ also denied certification based on the level of dissolved oxygen and LBI's failure to obtain an exemption from the Comprehensive State Water Plan.

Rather, it denied certification on the grounds that the issue had not been resolved between LBI and USFWS.

LBI asked IDEQ to reconsider and supplied IDEQ with additional information to support its position. IDEQ refused, and LBI filed an appeal with the Idaho Board of Health and Welfare on September 7, 1993. That appeal is currently pending. A decision will likely take another year. After that, either party could seek judicial review of the agency's order. No immediate resolution is in sight.

In the meantime, FERC has suspended processing LBI's license application. FERC is unwilling to conduct an environmental assessment or prepare an environmental impact statement without § 401 certification from IDEQ. LBI is not willing to spend more money on environmental studies without some guarantee that it will obtain a water quality certificate from IDEQ. The process is stalemated.

Even assuming LBI could eventually obtain § 401 certification, the process would start over again at FERC. After FERC reinstated the license applications, it would certify the projects were ready for environmental analysis. FERC would either conduct an environmental assessment or prepare an impact statement. LBI would be required to conduct further studies. The same state and federal agencies, plus several more, would revisit the very same issues and concerns currently raised by IDEQ in the certification process. At the end of this process, FERC would conduct a § 10(j) review to determine what conditions should be imposed on the license. LBI estimates that it would take an additional two to three years and perhaps another million dollars to obtain a license from FERC.

B. Benham Falls Project.

In this project, the developers planned to construct a hydroelectric facility on the Deschutes River near Bend in central Oregon. They filed an application with FERC for an original license. As part of the license process, the developers requested § 401 certification from the Oregon Department of Environmental Quality (ODEQ). The ODEQ denied certification because the developers failed to obtain a statement from Deschutes County that the project was compatible with the county's comprehensive land use plan and land use ordinances. The developers appealed ODEQ's denial to the Environmental Quality Commission (EQC). The EQC affirmed the ODEQ. The developers then sought judicial review of the EQC's order denying them § 401 certification.

The Oregon Court of Appeals held that the EQC and the ODEQ could not deny certification for failure to comply with state land use laws.⁸ Only violations of the specific provisions enumerated in § 401(a)(1) or of the state regulations issued thereunder provide the basis to deny a water quality certificate.

In dicta, the court indicated that the ODEQ could consider land use issues in determining what conditions to impose on the water quality certificate under § 401(d). That is precisely what ODEQ did on remand. When ODEQ denied certification a second time, the developers lacked the financial resources to withstand another round of agency and judicial appeals and ultimately abandoned the project.

⁸ The decision of the Oregon Court of Appeals is reported in *Arnold Irrigation Dist. v. DEQ*, 79 Or. App. 136, 717 P.2d 1274, rev. denied, 301 Or. 765 (1986).

C. Through the Guise of § 401(d), States have Distorted the Balance of Authority in the Licensing Process.

Congress never intended to create, nor did it ever envision, the duplicative, lengthy and costly licensing process described in the examples above. This Court recognized the impracticability of such a system in *First Iowa* when it stated that this "dual final authority, with a duplicative system of state permits and federal licenses required for each project, [is] unworkable." 328 U.S. at 169.

The two examples discussed above illustrate that the current process is unworkable. As the Ninth Circuit recently noted, it is the process itself that creates a hardship:

Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there will ever be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change.

Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 453 (9th Cir. 1993).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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APPENDIX

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<u>Name</u>	<u>City</u>	<u>State</u>
ABB Phoenix Controls	Bothell	WA
Alaska Power & Telephone	Port Townsend	WA
Central Oregon I.D.	Redmond	OR
Chelan PUD	Wenatchee	WA
CHI West, Inc.	Boise	ID
City of Tacoma/Utility	Tacoma	WA
Consolidated Hydro, Inc.	Grenich Plaza	CT
Consolidated Pumped Stor.	Greenwich	CT
David Evans and Associates	Portland	OR
Davis Wright Tremaine	Portland	OR
Deschutes Valley Water Dist.	Madras	OR
Douglas County PUD	E. Wenatchee	WA
EBASCO Services, Inc.	Bellevue	WA
EDAW	San Francisco	CA
EG&G Idaho, Inc.	Idaho Falls	ID
Falls Creek HB Limited P.	Eugene	OR
Grant County PUD	Ephrata	WA
Harza Northwest, Inc.	Bellevue	WA
HCI Publications	Kansas City	MO
HDR Engineering, Inc.	Bellevue	WA
Hydro West Group, Inc.	Bellevue	WA
Hydro Y.E.S.	Ferndale	WA
Ida-West Energy	Boise	ID
Impsa International, Inc.	Pittsburgh	PA
Kvaeme-Hydro Power, Inc.	Stamford	CT
Lilliwaup Falls Generating Co.	Seattle	WA
Middle Fork Irrigation Dist.	Parkdale	OR
National Hydro	Boston	MA
Northrop Devine & Tarbell, Inc.	Portland	ME
NW Pipe & Casing Co.	Portland	OR
NW Power Planning Council	Portland	OR
Okanogan County PUD	Okanogan	WA
Pacific Hydro Consulting Group	Alameda	CA
Pacific Water Works Supply	Seattle	WA
PacifiCorp	Portland	OR
Pend Oreille County PUD	Newport	WA
Portland General Electric	Portland	OR
Precision Machine & Supply	Lewiston	ID

2a

<u>Name</u>	<u>City</u>	<u>State</u>
Puget Power	Bellevue	WA
R W Beck & Associates	Seattle	WA
Ray Toney & Assoc.	Redding	CA
Resource Management	Portland	OR
Santiam Water Control Dist.	Aumsville	OR
Shannon & Wilson, Inc.	Seattle	WA
Siemens Power Corporation	West Allis	WI
Sithe Energies USA, Inc.	New York	NY
Snohomish County PUD	Everett	WA
STS HydroPower, Ltd.	Issaquah	WA
STS HydroPower, Ltd.	Sacramento	CA
Tetragenics	Butte	MT
Van Ness, Feldman & Curtis	Seattle	WA
Van Ness, Feldman & Curtis	Washington	DC
Warm Springs Power Ent.	Warm Springs	OR
Washington Water Power Co.	Spokane	WA